RECORD AND BRIEFS.

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No. 16-___

In the Supreme Court of the United States

CHARLOTTE JENKINS, Warden,

Petitioner,

v.

PERCY HUTTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTIONS PRESENTED

An Ohio jury determined (1) that two aggravating circumstances made Percy Hutton death-penalty eligible at the *guilt* phase of his trial, and (2) that the aggravating circumstances outweighed the mitigating factors at the *penalty* phase. In a collateral attack, Hutton challenged the penalty-phase instructions on the ground that they failed to clarify that the aggravating circumstances were the same ones that the jury had found at the guilt phase. The Warden argued that Hutton defaulted this claim, and that the state courts' independent reweighing of the circumstances cured any alleged weighing-stage error.

The Sixth Circuit granted Hutton relief. On its own initiative, the court invoked the miscarriage-of-justice exception to procedural default, which applies only to individuals who can show that they are "actually innocent" of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). The court also found that appellate reweighing could not cure the alleged instructional error. To do so, it extended *Ring v. Arizona*, 536 U.S. 584 (2002)—which held that a jury must find the aggravating factors that make a defendant death-penalty *eligible*—into the *weighing* stage. This case presents two questions:

1. Did the Sixth Circuit properly hold, on its own initiative, that Hutton could overcome his procedural default under *Sawyer*'s actual-innocence exception?

2. Did the Sixth Circuit properly hold that judicial reweighing cannot cure errors at the weighing stage of a capital trial by extending *Ring*'s standards from the eligibility phase into that weighing phase?

LIST OF PARTIES

The Petitioner is Charlotte Jenkins, the Warden of the Chillicothe Correctional Institution. Jenkins is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

The Respondent is Percy Hutton, an inmate imprisoned at the Chillicothe Correctional Institution.

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The Ohio intermediate appellate court's initial decision on direct appeal, *State v. Hutton*, No. 51704, 1988 WL 39276 (Ohio Ct. App. Apr. 28, 1988), is reproduced at Pet. App. 317a-424a. The Ohio Supreme Court's review of that decision, *State v. Hutton*, 559 N.E.2d 432 (Ohio 1990), is reproduced at Pet. App. 282a-316a. The Ohio intermediate appellate court's decision on remand from the Ohio Supreme Court, *State v. Hutton*, 594 N.E.2d 692 (Ohio Ct. App. 1991), is reproduced at Pet App. 272a-279a. The Ohio Supreme Court's opinion affirming that decision, *State v. Hutton*, 797 N.E.2d 948 (Ohio 2003), is reproduced at Pet. App. 238a-267a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its decision on October 12, 2016. On December 13, 2016, it denied rehearing en banc. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In September 1985, Percy Hutton avenged the alleged theft of a sewing machine and cash by kidnapping and killing Derek "Ricky" Mitchell, and by kidnapping and attempting to kill Samuel Simmons, Jr. Pet. App. 239a-245a. At the *guilt phase* of his trial, a jury convicted Hutton of aggravated murder and found two aggravating circumstances that triggered Hutton's death-penalty eligibility (that Hutton committed the murder while kidnapping Mitchell and in a course of conduct involving the attempted murder of Simmons). Trial Tr., R.16-29, PageID#7697-700. Thirty years later, a divided Sixth Circuit granted Hutton habeas relief on the ground that the state trial court had erred when it failed to restate what the aggravating circumstances were for the jury at the *penalty phase* of Hutton's trial (where the jury balanced the aggravating and mitigating circumstances). Pet. App. 25a.

The Sixth Circuit could grant this relief only by surmounting two obstacles. *First*, Hutton procedurally defaulted his jury-instruction claim. The Sixth Circuit reached the defaulted claim by invoking—on its own initiative—an exception to procedural default that is reserved for "extraordinary" cases: the actual-innocence exception from *Sawyer v. Whitley*, 505 U.S.

333 (1992). The court relied on this exception even though Hutton had never argued that he was "actually innocent" of the death penalty, and even though "Hutton's eligibility for the death penalty is indisputable" given the jury's aggravating-circumstance findings at the guilt phase of his trial. Pet. App. 48a (Rogers, J., dissenting).

Second, the state appellate courts had reweighed the aggravating and mitigating circumstances and found the death penalty appropriate. That cured any penalty-stage instructional errors under *Clemons v. Mississippi*, 494 U.S. 738 (1990). To reject *Clemons*, the Sixth Circuit was forced to extend into the *weighing stage* of a capital trial this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)—which required the jury to find the aggravating circumstances that trigger the death penalty at the *eligibility stage*.

The Sixth Circuit's decision on both issues warrants this Court's review because it conflicts with the Court's cases and with cases from other courts.

I. THE STATE PROCEEDINGS

A. Ohio Juries Decide At The Guilt Phase Whether An Aggravating Factor Makes A Defendant Death-Penalty Eligible

Ohio's capital-sentencing system, both in 1985 and today, involves a bifurcated trial. The jury finds the aggravating circumstances that make a defendant death-penalty eligible at the *guilt phase*. The jury weighs those same circumstances against mitigating factors at the *penalty phase*. And the state courts provide a further check by reexamining a jury's deci-

sion to impose the death penalty (but not its decision to impose a life sentence).

Guilt Phase. The jury decides the defendant's eligibility for the death penalty at the first phase of trial (the "guilt phase"). The indictment must charge the defendant with aggravated murder and include at least one aggravating circumstance (also known as a "capital specification"). Ohio Rev. Code § 2929.03(A)-(B) (1985); *id.* § 2929.04(A) (1985) (listing aggravating circumstances). The prosecution must prove the aggravating circumstance beyond a reasonable doubt. *Id.* § 2929.03(B) (1985). The defendant becomes eligible for the death penalty only if the jury finds the defendant guilty of *both* aggravated murder *and* at least one aggravating circumstance. *Id.* § 2929.03(C)(2) (1985).

Penalty Phase. If the jury convicts the defendant of aggravated murder and at least one aggravating circumstance, the case proceeds to the penalty phase. There, the prosecution must prove beyond a reasonable doubt "that the aggravating circumstances the defendant was found guilty of committing" *at the guilt phase* outweigh any mitigating factors. *Id.* § 2929.03(D)(1) (1985). The defendant may present "evidence of any factors in mitigation," but the jury may consider *only* the aggravating circumstances found at the guilt phase. *Id.* The jury recommends a death sentence only if it finds beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. *Id.* § 2929.03(D)(2) (1985). Otherwise, it must recommend life imprisonment. *Id.* If the jury recommends life, the trial court *cannot* impose a death sentence. *Id.*

If the jury recommends death, the court must conduct an independent review. *Id.* § 2929.03(D)(3) (1985). The court may impose a death sentence only if it agrees with the jury, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors. *Id.* If it does not make that finding, it must impose a life sentence despite the jury's recommended death sentence. *Id.*

Appeal. In 1985, Ohio law required "the court of appeals and the Supreme Court . . . [to] review the sentence of death at the same time that they review[ed] the other issues in the case." *Id.* § 2929.05(A) (1985). Those courts were required to "review and independently weigh all of the facts and other evidence disclosed in the record in the case . . . to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case." *Id.* They were permitted to "affirm a sentence of death only if" they were "persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh[ed] the mitigating factors present in the case." *Id.* (Ohio's modern process is substantially the same, except that capital cases are now appealed directly to the Ohio Supreme Court. Ohio Rev. Code §§ 2929.05, 2953.02 (2017).)

B. A Jury Convicted Hutton Of Murder And Two Aggravating Circumstances, And He Was Sentenced To Death

Ohio indicted Hutton on two counts of aggravated murder, two counts of kidnapping, and one count of attempted murder. Pet. App. 244a-245a. Each aggravated-murder count carried two aggravating cir-

cumstances (or capital specifications): a course-of-conduct specification for killing Mitchell while attempting to kill Simmons, Ohio Rev. Code § 2929.04(A)(5) (1985), and a "felony murder" specification for kidnapping Mitchell before killing him, Ohio Rev. Code § 2929.04(A)(7) (1985). Pet. App. 245a. The counts also carried noncapital firearm specifications. *Id.*

At the *guilt* phase, the prosecutor explained the trial phases to the jury. During voir dire, the prosecutor noted that a guilt finding for the course-of-conduct and felony-murder circumstances would trigger a penalty phase. Trial Tr., R.16-24, PageID#6119-21. At that phase, the prosecutor continued, the jury would ask whether "Ohio [had] been able to prove that the aggravating circumstances of the crime, those things that we are talking about, those specifications[,] outweigh beyond a reasonable doubt whatever mitigating factors the Jury should decide that there are." *Id.*, PageID#6121. The prosecutor's opening statements reiterated that those two aggravating circumstances were "the specifications which trigger the possibility of the death penalty." *Id.*, PageID#6257.

The trial court instructed the jury on its responsibilities for guilt-phase findings. Trial Tr., R.16-29, PageID#7650-89. It noted that "as to each count and each specification there must be a finding by the Jury." *Id.*, PageID#7669. The jury found Hutton guilty on all counts, including the two death-penalty aggravating circumstances, making him death-penalty eligible. *Id.*, PageID#7697-700.

At the *penalty* phase, the prosecutor noted that the "givens" were "those aggravating circumstances that you found to exist in the first phase." *Id.*, PageID#7729. He added that the jury would "be only addressing . . . two of the specifications"—the course-of-conduct and felony-murder ones. *Id.*, PageID#7729-30. And he indicated that the jury should ask: "Do the aggravating circumstances of the crime, which you have already found to exist beyond a reasonable doubt, do they outweigh whatever mitigating factors you decide there are beyond a reasonable doubt here in this phase of the trial?" *Id.*, PageID#7731.

The trial court's penalty-phase instructions noted that the prosecution must prove "that the aggravating circumstances, *of which the Defendant was found guilty*, outweigh the factors in mitigation of imposing the death sentence." *Id.*, PageID#7767 (emphasis added). The court did not, however, further clarify that those aggravating circumstances were the two that the jury had already found at the guilt phase. "[T]he Court afforded counsel the opportunity to make recommendations for additions or deletions to the Court's charge," but Hutton's counsel "had no objections." *Id.*, PageID#7772.

Ultimately, the jury found "that the aggravating circumstances which the Defendant, Percy Hutton, was found guilty of committing, [were] sufficient to outweigh the mitigating factors presented." *Id.*, PageID#7777-78. It recommended a death sentence. *Id.* The trial court imposed that sentence. Pet. App. 245a.

C. The Ohio Supreme Court Affirmed Hutton's Conviction And Sentence

1. Hutton appealed. An intermediate appellate court reversed his convictions, Pet. App. 317a-424a, but the Ohio Supreme Court reversed that decision, affirmed Hutton's convictions, and remanded to the court of appeals for an independent review of Hutton's capital sentence, Pet. App. 282a-316a.

In the Ohio Supreme Court, three justices partially dissented on grounds that had not been raised at trial or on appeal. Pet. App. 313a-316a (Brown, J., dissenting). The dissent would have found "a plain error in the jury instructions" due to the trial court's failure "to tell the jury what the 'aggravating circumstances' were" at the penalty phase. Pet. App. 313a, 315a. Because the penalty-phase instructions did not *restate* the aggravating circumstances that the jury had found during the guilt phase, the dissent felt that "the jury [had been] left 'with untrammeled discretion to impose or withhold the death penalty.'" Pet. App. 316a (quoting *Gregg v. Georgia*, 428 U.S. 153, 196 n.47 (1976)). The majority "decline[d] to address" this issue because "Hutton specifically declined to object to the instructions at trial, and ha[d] not raised or briefed" the claim. Pet. App. 286a n.1.

On remand, the intermediate appellate court reweighed the circumstances, and affirmed Hutton's death sentence. Pet. App. 272a-281a.

2. Hutton applied to reopen his direct appeal based on the alleged ineffective assistance of his appellate counsel. In that proceeding (called a "Rule 26(B)" application), Hutton claimed that appellate

counsel had been ineffective for failing to assign error to the trial court's penalty-phase instructions. Pet. App. 268a-271a. An Ohio appellate court denied the application. *Id.*

3. In 2000, Hutton filed a delayed appeal from the 1991 independent reweighing of his sentence. Pet. App. 69a. That appeal was consolidated with an appeal from his Rule 26(B) denial. Pet. App. 247a.

The Ohio Supreme Court affirmed Hutton's sentence. Pet. App. 238a-267a. It held that the evidence supported the jury's findings of two aggravators, and that those circumstances outweighed the mitigating factors. Pet. App. 259a-265a. The court also rejected Hutton's ineffective-assistance claim. Pet. App. 251a-259a. It held that counsel's "[f]ailure to raise the waived instructional issue"—which would have been subject to plain-error review—"was not deficient performance." Pet. App. 255a.

4. Hutton also filed two petitions for post-conviction relief. The state appellate court denied those petitions. Pet. App. 218a-225a, 227a-237a. The Ohio Supreme Court denied discretionary review in both instances. Pet. App. 217a, 226a.

II. THE FEDERAL PROCEEDINGS

A. The District Court Denied Hutton Relief

Hutton filed a 28 U.S.C. § 2254 petition. Pet. App. 82a-84a. He asserted, among other claims, that "[t]he trial court failed to define the term 'aggravating factor' for the jury prior to its deliberations in the penalty phase" (referred to in this brief as "the jury-instruction claim"), Pet. App. 85a, and that appellate

counsel had been ineffective for failing to raise that claim, Pet. App. 98a-99a, 201a. Hutton conceded that the jury-instruction claim was procedurally defaulted because he failed to raise it on direct appeal, but attempted to prove "cause and prejudice" to excuse the default based on the alleged ineffective assistance of appellate counsel. Pet. App. 201a.

The district court denied relief. It rejected Hutton's jury-instruction claim as both procedurally defaulted and meritless. *Id.* On the default, the court held that Hutton's ineffective-assistance claim did not constitute "cause" to overcome the procedural bar. *Id.*; *see also* Pet. App. 162a-164a. On the merits, the district court held that, even if an instructional error had occurred, "the error was cured by the court of appeals' reweighing of mitigating and aggravating circumstances." Pet. App. 203a.

B. The Sixth Circuit Reversed And Granted A Writ Of Habeas Corpus

A divided Sixth Circuit reversed the district court's decision on Hutton's jury-instruction claim. Pet. App. 2a-53a. Writing for the court, Judge Donald agreed that Hutton had defaulted this claim. Pet. App. 18a. Yet the court excused this procedural default based on an exception that Hutton himself had not advanced—the "'fundamental miscarriage of justice'" exception. Pet. App. 19a (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

The court acknowledged that Hutton had waived any miscarriage-of-justice argument. Pet. App. 20a. Yet it overlooked that waiver, and concluded that Hutton satisfied the "actual innocence" test from

Sawyer. Pet. App. 20a-25a. *Sawyer* holds that a petitioner may overcome the default of a claim challenging a capital sentence if the petitioner "show[s] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." 505 U.S. at 336. The Sixth Circuit found this test satisfied because the penalty-phase instructions had not explained to the jury that the aggravating circumstances that it had already found at the guilt phase were the ones that it should weigh against the mitigating factors. Pet. App. 24a-25a. Given the absence of such an instruction, the court believed, "[t]here [was] nothing in the record that indicate[d] that the jury's finding that the aggravating circumstances outweighed the mitigating ones was actually based on a review of any valid aggravating circumstances." Pet. App. 24a. The potential for the jury to have relied on erroneous aggravating circumstances at this weighing stage, the court added, satisfied *Sawyer*'s actual-innocence exception. Pet. App. 25a.

The court also held that the Ohio appellate courts' independent reweighing of the aggravating and mitigating circumstances could not overcome the alleged error. Pet. App. 20a-21a, 25a. It acknowledged this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), which held that a federal court may uphold a death sentence based on an improperly defined aggravating circumstance if a state appellate court independently reweighs the aggravating and mitigating circumstances. Pet. App. 23a. The court distinguished *Clemons*, however, because it believed

that Hutton's jury was not merely given improper guidance as to the aggravating circumstances; rather, it "was precluded from making the necessary findings of aggravating circumstances *in the first place*." Pet. App. 23a-24a. That, the court reasoned, triggered this Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016)—both of which held that the Sixth Amendment requires a jury, not a judge, to find the aggravating circumstances that make a defendant death-penalty eligible. Pet. App. 22a-24a.

The court affirmed on the other claims, and remanded the case "with instructions to order Hutton's release from custody unless the state grants a new sentencing hearing within 180 days from the date that the mandate issues." Pet. App. 36a.

Judge Merritt filed a concurrence. The concurrence agreed with the court's miscarriage-of-justice analysis and with its ultimate disposition. Pet. App. 43a. It also would have held that no procedural default had occurred, Pet. App. 36a-38a, and that any default was excused by Hutton's allegedly meritorious ineffective-assistance claims, Pet. App. 42a.

Dissenting, Judge Rogers would have affirmed on all claims. While agreeing with the court that Hutton's claim was defaulted, the dissent disagreed that the actual-innocence exception applied. Pet. App. 45a (Rogers, J., dissenting). "Not only does that exception to procedural default not apply in this case," the dissent noted, "but Hutton never even raised the exception in the district court or on appeal." *Id.* It criticized the majority for "lightly brush[ing] aside"

"[t]he procedural rules that constrain federal-court oversight of state criminal proceedings." *Id.*

Even if Hutton had raised an actual-innocence argument, the dissent concluded that the argument would fail. Pet. App. 48a-51a. His "eligibility for the death penalty is indisputable," the dissent reasoned, because the jury convicted him of two aggravating circumstances during the *guilt* phase. Pet. App. 48a-49a. Any error in the *penalty* phase, where the jury weighed the aggravating circumstances that it had already found against the mitigating ones, could not have affected Hutton's eligibility for his sentence. Pet. App. 49a-50a. This fact also distinguished *Ring* and *Hurst*. Pet. App. 51a-52a. As a result, the Constitution allowed the Ohio courts to cure any purported jury-instruction error by "conclud[ing] that the death sentence was appropriate after reweighing the aggravating circumstances against the mitigating evidence." Pet. App. 53a.

The Sixth Circuit denied rehearing en banc. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

The Court should grant review for two reasons. *First*, the Sixth Circuit's actual-innocence analysis conflicts with this Court's cases and with cases from many circuits regarding the "actual-innocence" exception to the procedural-default rule. *Second*, the Sixth Circuit's holding that *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), barred the state courts from using appellate reweighing to fix *weighing-stage* errors conflicts with

many decisions that have limited *Hurst* and *Ring* to the *eligibility stage* of a capital trial.

I. The Decision Below Conflicts With This Court's Cases And Creates A Circuit Split On The Actual-Innocence Exception

The Court should grant review because the Sixth Circuit's dramatic (and *sua sponte*) expansion of the actual-innocence exception conflicts with this Court's cases and with cases from other circuits.

A. The Sixth Circuit's Decision Conflicts With This Court's Cases

This Court has cabined the actual-innocence exception to extraordinary cases, but the decision below greatly expands that exception.

1. The actual-innocence exception applies only if a petitioner can show *factual* innocence of the elements required for the death penalty

a. Out of "concerns for the finality of state judgments of conviction and the 'significant costs of federal habeas review,'" federal courts generally cannot review defaulted claims unless a petitioner can show cause and prejudice for the default. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992) (citation omitted). This cause-and-prejudice standard ensures that state trials remain "decisive and portentous event[s]." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Although the Court has expressed confidence that the cause-and-prejudice standard will protect against "'a fundamentally unjust incarceration,'" it has declined to "pretend that this will always be true."

Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (citation omitted). It has thus reserved for "extraordinary case[s]" one exception: A federal court may excuse a default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 496. This actual-innocence exception "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). It may apply if a petitioner alleges innocence of the underlying crime of which the petitioner was convicted, *see Schlup v. Delo*, 513 U.S. 298 (1995), or if a petitioner alleges "innocence" of a capital sentence, *see Sawyer*, 505 U.S. 333.

Sawyer delineates the test for capital sentences. "[T]o show 'actual innocence'" in that context, "one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* at 336.

Sawyer's facts illustrate what is required to meet this standard. There, the Court rejected the petitioner's attempt to present defaulted claims based on new evidence that the petitioner was "actually innocent" of his sentence. *Id.* at 347-50. That evidence concerned the petitioner's "role in the offense" (including affidavits attacking a witness's credibility and providing a potentially exculpatory statement) as well as medical records about the petitioner's mental health. *Id.* at 347-48. Neither set of evidence undermined the jury's *eligibility* findings. *Id.* at 347-50. The mental-health records were irrelevant. *Id.*

at 348. They neither "relate[d] to petitioner's guilt or innocence of the crime," nor to "the aggravating factors found by the jury that made the petitioner eligible for the death penalty." *Id.* The witness-credibility affidavit fared no better; that "sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear-and-convincing showing that no reasonable juror would have believed the heart of" the witness's account. *Id.* at 349. Finally, although the potentially exculpatory statement went to the jury's finding of an aggravating factor, the Court concluded that the "affidavit, in view of all the other evidence in the record, [did] not show that no rational juror would find that petitioner committed both of the aggravating circumstances found by the jury." *Id.* at 349-50.

b. *Sawyer* and other cases demonstrate several key points about this actual-innocence exception.

To begin with, the exception is true to its name—it "is concerned with actual as compared to legal innocence." *Id.* at 339. In the noncapital context, "[a] prototypical example of 'actual innocence' . . . is the case where the State has convicted the wrong person of the crime." *Id.* at 340. In capital cases, similarly, actual innocence requires a showing of innocence of the crime *or* of the other requirements for eligibility (i.e., the aggravating circumstances). *Id.* at 345-47. "[A] claim of actual innocence must," therefore, "be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Petitioners must cast doubt on more than the constitutional validity of their sentence; they must present

new facts that undermine the finding of guilt or death-penalty eligibility.

In addition, an *actual-innocence claim* that overcomes a procedural default is distinct from the *constitutional claim* that entitles a petitioner to habeas relief. "[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404; *see McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (calling "actual innocence" "a gateway through which a petitioner may pass" when impeded by a "procedural bar"). The exception applies "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). Thus, "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup*, 513 U.S. at 316.

Finally, "tenable actual-innocence gateway pleas are rare." *McQuiggin*, 133 S. Ct. at 1928. The Court has "emphasized the narrow scope of the fundamental miscarriage of justice exception." *Sawyer*, 505 U.S. at 340. The exception will be met only in the "extraordinary case." *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks omitted).

2. The Sixth Circuit dramatically expanded the actual-innocence exception to cover legal errors that have nothing to do with actual innocence

The Sixth Circuit's decision applied the actual-innocence exception even though Hutton had *never* raised it. Pet. App. 20a; *id.* at 47a (Rogers, J., dissenting). Its decision to reach the exception *sua sponte* provides a compelling reason for review. And its application of the exception conflicts with this Court's jurisprudence in at least three ways.

a. *Eligibility v. Weighing Stage.* The Sixth Circuit erred by extending the exception from the *eligibility* stage (asking whether aggravating circumstances make Hutton eligible for the death penalty) into the *weighing* stage (asking whether those circumstances outweigh mitigating circumstances). At the guilt phase, a jury determines whether aggravating circumstances exist so as to trigger a defendant's eligibility for the death penalty. Ohio Rev. Code § 2929.03(B)-(C) (1985). The penalty phase, by comparison, concerns the weighing of the already found aggravating circumstances against any mitigating ones. *Id.* § 2929.03(D) (1985). In this case, the jury found two aggravating circumstances at the guilt (eligibility) stage. Trial Tr., R.16-29, PageID#7697-700. Thus, "Hutton's eligibility for the death penalty is indisputable." Pet. App. 48a (Rogers, J., dissenting). Yet the Sixth Circuit invoked the actual-innocence exception for an alleged *weighing-stage* error, concluding that "the failure to define 'aggravating circumstances' in the [penalty-phase] jury instructions"

resulted in a "fundamental miscarriage of justice." Pet. App. 24a-25a.

This conflicts with *Sawyer*. *Sawyer* identified "three possible ways" to define "actual innocence." 505 U.S. at 343. It rejected the "strictest" definition, which would ask whether a petitioner was innocent of "the elements" of the crime. *Id.* And it rejected the "most lenient," which would extend "actual innocence" "to mitigating evidence that bore not on the defendant's eligibility [for] the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment"—here, penalty-stage weighing. *Id.* at 344-46. Instead, the Court chose a middle ground, asking whether a petitioner was "innocent" of the aggravating circumstance that triggered death-penalty *eligibility*—here, the jury's guilt-stage finding that Hutton was guilty of two aggravating circumstances. *Id.* at 347; Trial Tr., R.16-29, PageID#7697-700. By expanding "actual innocence" to the weighing stage, the Sixth Circuit all but adopted the "lenient" definition that *Sawyer* rejected.

b. *Legal v. Factual Innocence.* The Sixth Circuit next erred by extending the actual-innocence exception to *legal*, not just *factual*, claims. Neither the panel nor Hutton identified *new evidence* suggesting that Hutton did not factually commit the acts making up the aggravating circumstances of which he was convicted—i.e., that he did not kidnap Ricky Mitchell (the felony-murder circumstance), or attempt to murder Samuel Simmons (the course-of-conduct circumstance). The panel instead found Hutton "innocent" of the death penalty because of an

alleged legal error in the penalty-phase instructions. Pet. App. 24a-25a.

The Sixth Circuit's holding that the actual-innocence exception reaches legal errors unrelated to *factual* innocence conflicts with *Sawyer*. There, the petitioner claimed that "but for the alleged violations, he could have *introduced evidence* negating a state-law element of death-penalty eligibility." *Frazier v. Jenkins*, 770 F.3d 485, 507 (6th Cir. 2014) (Sutton, J., concurring in judgment) (emphasis added) (explaining the petitioner's argument in *Sawyer*). *Sawyer* nowhere held that a legal error *alone* would suffice. The "exception is concerned with actual as compared to legal innocence." 505 U.S. at 339.

c. *Gateway v. Constitutional Claim*. The Sixth Circuit lastly erred by conflating the constitutional claim entitling Hutton to relief from his *sentence* with the actual-innocence claim entitling Hutton to relief from his *default*. The court allowed a jury-instruction claim (alleging a violation of *Ring* and *Gregg v. Georgia*, 428 U.S. 153 (1976)) to double as an actual-innocence claim. Pet. App. 24a-25a.

This conflicts with *Sawyer*, too. *Sawyer* held that the constitutional claim *itself* does not satisfy the exception. "If federal habeas review of capital sentences is to be at all rational," a "petitioner must show something more in order for a court to reach the merits." 505 U.S. at 345. Indeed, if a meritorious constitutional claim (prejudice) were enough to satisfy the miscarriage-of-justice exception, a federal court could always dispense with "cause" altogether. *See id.* at 345 n.13. Thus, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway

through which a . . . petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404.

Under the Sixth Circuit's view, by contrast, the typical cause-and-prejudice standard will always be swallowed by the "rare" actual-innocence exception. The Sixth Circuit rejected Hutton's cause-and-prejudice arguments when it affirmed the denial of his ineffective-assistance claims. Pet. App. 25a-27a; *see* Pet. App. 46a & n.2 (Rogers, J., dissenting). Yet it held that the supposed validity of his constitutional claim alone (i.e., prejudice) was enough to overcome a procedural bar. *See* Pet. App. 24a-25a.

By collapsing Hutton's constitutional and gateway claims, the Sixth Circuit's decision allows a gateway claim to overcome a default *whenever* a constitutional claim has merit. This case proves that risk. The court's holding that a violation of *Ring*—which held that a jury, not a judge, must find the aggravating circumstances—established an actual-innocence claim suggests that most constitutional violations also can double as gateway claims. After all, *Ring* does not even apply retroactively, as it did *not* adopt a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 352, 358 (2004) (internal quotation marks omitted). It is difficult to see how *Ring* can be "fundamental" for the miscarriage-of-justice exception but "non-fundamental" for retroactivity purposes.

B. The Sixth Circuit's Expansion Of The Actual-Innocence Exception Conflicts With Other Circuits' Narrower Views Of It

Other courts have heeded this Court's command to "exercise restraint when determining whether to expand the exceptions to the procedural default rule." *McKay v. United States*, 657 F.3d 1190, 1198 (11th Cir. 2011). The Sixth Circuit's expansion of the actual-innocence exception conflicts with these decisions. This split occurs along the same fault lines marking the Sixth Circuit's departure from *Sawyer*.

1. *Eligibility v. Weighing Stage.* Many courts hold that the actual-innocence exception applies only at the *eligibility* stage, not the *weighing* stage, of a capital trial. The Eighth Circuit, for example, has concluded that "courts may not consider the jury's penalty-phase *balancing function*" when analyzing an actual-innocence claim. *Wooten v. Norris*, 578 F.3d 767, 781 (8th Cir. 2009) (emphasis added). *Wooten* held that mental-health evidence pertinent to the weighing stage did not show that "reasonable jurors would have found . . . elements of the crime or the aggravator missing." *Id.* at 782. As a result, the actual-innocence exception could not apply. *Id.*

The Tenth Circuit has made the same point. In *Black v. Workman*, 682 F.3d 880 (10th Cir. 2012), the petitioner claimed that he could satisfy the exception with his brother's previously un-introduced testimony about their horrendous childhood. *Id.* at 915. If the jury had considered that testimony, he argued, "it would not have found that aggravating circumstances outweighed mitigating factors and thus would not have sentenced him to death." *Id.* The

Tenth Circuit found this argument "foreclosed by *Sawyer*." *Id.* *Sawyer* refused to "broaden[] the actual-innocence inquiry beyond guilt of the crime and the presence of aggravating circumstances." *Id.* Thus, the weighing of circumstances was "not an element for purposes of the actual-innocence inquiry." *Id.* at 916.

Other circuits have read *Sawyer* in the same way—as "reject[ing] the argument that a constitutional error that impacts only the jury's *discretion* whether to *impose* a death sentence upon a defendant who is unquestionably *eligible* for it under state law can . . . excuse the failure to raise it timely in prior state and federal proceedings." *Rocha v. Thaler*, 626 F.3d 815, 823 (5th Cir. 2010). "In other words, even if the petitioner can show that but for the constitutional error the weighing of the factors might have been different, that is not enough to make a colorable showing of actual innocence." *Johnson v. Singletary*, 991 F.2d 663, 668 (11th Cir. 1993); *see Buckner v. Polk*, 453 F.3d 195, 200 n.4 (4th Cir. 2006).

The Sixth Circuit's decision cannot be squared with these cases. As the Eighth Circuit observed, "actual innocence refers only to the underlying factors of guilt and the jury's finding of death-qualifying aggravators." *Wooten*, 578 F.3d at 781. Ohio juries make those findings during the *guilt phase*, and Hutton's trial was no exception. Trial Tr., R.16-29, PageID#7697-700; Pet. App. 49a (Rogers, J., dissenting) ("As there [was] no question about the validity of the two specifications, any error in the *penalty-phase* jury instructions did not affect Hutton's eligibility for

the death penalty."). Yet the Sixth Circuit found actual innocence due to an alleged error at the penalty phase—*after* the jury had made the eligibility findings and *during* the time that it was weighing the aggravating circumstances against the mitigating ones. In these other circuits, the actual-innocence exception simply would not apply at this stage.

In his en banc opposition, Hutton responded to this point by claiming that "[t]he element at issue is" whether the "aggravating circumstance outweighs the mitigating factors." Opp., App. R.76, at 7. That argument misreads Ohio law and does not reconcile the decision below with these cases. Under Ohio's capital-sentencing system, "[w]eighing is *not* a fact-finding process subject to the Sixth Amendment, because '[those] determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *State v. Belton*, __ N.E.3d __, 2016-Ohio-1581 ¶ 60 (Ohio 2016) (citation omitted). Even if Ohio law were otherwise, it would not change the actual-innocence exception. The exception's scope is a *federal* question. As the Tenth Circuit has said, "*even if* state law considers the outweighing of mitigating circumstances by aggravating circumstances [to be] an 'element' of a capital sentence, it is not an element for purposes of the actual-innocence inquiry." *Workman*, 682 F.3d at 916 (emphasis added).

2. *Legal v. Factual Innocence.* Circuit courts have also routinely rejected actual-innocence arguments when the "arguments [went] to legal innocence, as opposed to factual innocence." *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000); *Shore v.*

Davis, 845 F.3d 627, 633 n.4 (5th Cir. 2017) (declining to apply miscarriage-of-justice exception where petitioner had not "show[n] that he has a colorable claim of factual innocence"); *Pitts v. Norris*, 85 F.3d 348, 350-51 (8th Cir. 1996) (same); *see also Buie v. McAdory*, 341 F.3d 623, 626 (7th Cir. 2003). These decisions recognize that "the 'actual innocence' rationale remains firmly rooted in the testing of allegedly erroneous factual determinations." *Cristin v. Brennan*, 281 F.3d 404, 422 (3d Cir. 2002). That rationale is simply inapplicable when a petitioner relies solely on legal arguments.

The Sixth Circuit's decision ignored this principle. It found Hutton to be "actually innocent" simply because of an alleged error in the penalty-phase instructions, Pet. App. 24a-25a, not because of a claim that he did not kidnap or shoot his victims (so as to disprove the aggravating circumstances). Whether the trial court delivered adequate jury instructions has nothing to do with whether Hutton killed Mitchell while attempting to kill Simmons (the "course-of-conduct" circumstance) or kidnapped Mitchell before killing him (the "felony-murder" circumstance). The decision below thus conflicts with cases holding that an actual-innocence claim "'require[s] a showing that one of the statutory aggravators or other requirements for the imposition of the death penalty had not been met.'" *Jones v. Ryan*, 733 F.3d 825, 845 (9th Cir. 2013) (citation omitted). It relied on *no* new evidence to show that Hutton did not commit the two aggravating circumstances.

3. *Gateway v. Constitutional Claim.* Lastly, several circuits have highlighted the distinction between

the actual-innocence "gateway" (that allows a petitioner to overcomes a default) and the underlying constitutional claim (that secures habeas relief). *E.g.*, *Case v. Hatch*, 731 F.3d 1015, 1036-37 (10th Cir. 2013); *Rocha*, 626 F.3d at 824-25; *Sibley v. Culliver*, 377 F.3d 1196, 1207 n.9 (11th Cir. 2004); *Embrey v. Hershberger*, 131 F.3d 739, 741 (8th Cir. 1997); *Turner v. Jabe*, 58 F.3d 924, 932 (4th Cir. 1995). "[C]onsideration of a petitioner's gateway claim of innocence precedes consideration of his federal constitutional claim not just temporally but analytically." *Rocha*, 626 F.3d at 824. Without this distinction, the logic of an actual-innocence claim becomes "circular"; if a petitioner can "recharacterize[] his legal claim that he was wrongly convicted and sentenced as an assertion that he is 'actually innocent,' in an attempt to resuscitate the claim that he was wrongly convicted and sentenced," "then every sentence would be subject to an endless number of successive reviews." *Embrey*, 131 F.3d at 741.

Take the Eleventh Circuit's *Embrey* decision, a non-capital case. There, the petitioner claimed that he was legally ineligible for the sentence that he had received. *Id.* at 739-40. He attempted to overcome a procedural default by contending that this same fact made him "actually innocent" of that sentence. *Id.* at 740. Although the Eleventh Circuit thought *Sawyer* was inapplicable in the non-capital context, it added that the petitioner's legal argument did not show his "actual innocence." *Id.* at 740-41. It explained that "[a] legal claim" could, "by resort to a rather unsophisticated play on words, always be converted into a complaint that the relevant facts did not support a

conviction and that therefore the defendant was 'actually innocent.'" *Id.* at 741.

The approach rejected by *Embrey* is analogous to the one that the Sixth Circuit adopted. Although Hutton never argued that his jury-instruction claim made him "actually innocent," he did argue that it entitled him to relief. Pet. App. 14a. The Sixth Circuit used that same claim to excuse Hutton's default. *Compare* Pet. App. 25a (finding a "fundamental miscarriage of justice" because "the jury, without proper instructions, could not have made a finding that aggravating circumstances existed"), *with id.* (granting relief because "*Apprendi*, *Ring*, and *Gregg* establish that Hutton's constitutional rights were violated").

In sum, the Sixth Circuit dramatically expanded the actual-innocence exception in a way that conflicts with this Court's cases and with cases from other circuits. That extension warrants this Court's review.

II. The Decision Below Conflicts With Cases From This Court And From Other Circuits Over Whether The Sixth Amendment Applies At A Capital Trial's Weighing Stage

In addition to its *sua sponte* expansion of the actual-innocence exception, the Sixth Circuit equally erred by expanding the Sixth Amendment's jury-trial guarantees into the weighing stage of a capital trial (where it is determined whether the aggravating circumstances outweigh the mitigating ones). This conclusion warrants review because it, too, conflicts with this Court's cases and with cases from other courts.

A. The Sixth Circuit's Decision Conflicts With This Court's Cases

This Court's capital-sentencing cases draw a line between errors concerning a defendant's death-penalty *eligibility*, which may not be cured by judicial reweighing, *see Hurst*, 536 U.S. at 609, and errors concerning the *weighing* of aggravating and mitigating circumstances, which may be cured by judicial reweighing, *see Clemons v. Mississippi*, 494 U.S. 738, 748-50 (1990). The Sixth Circuit's decision upends this distinction, and calls this Court's *Clemons* decision into doubt.

1. This Court's Sixth Amendment cases distinguish between the weighing and eligibility stages of a capital trial

The Sixth Amendment gives defendants "the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. Const. amend. VI. "[T]he fundamental meaning" of this guarantee "is that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). So "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Ring and *Hurst* explained how these principles applied to the capital-sentencing regimes of Arizona and Florida, respectively. *Ring*, which partially overruled *Walton v. Arizona*, 497 U.S. 639 (1990), found that "[c]apital defendants, no less than non-

capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. In Arizona, moreover, a defendant becomes eligible for the death penalty *only* if an aggravating factor is found. *Id.* at 597. "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" the Court held, "the Sixth Amendment requires that they be found by a jury," rather than a judge, beyond a reasonable doubt. *Id.* at 609 (citation omitted).

Hurst applied *Ring*'s holding to Florida's similar sentencing system. 136 S. Ct. at 621-24. Florida juries made only *recommendations* concerning the aggravating factors and the ultimate decision on whether to impose a death sentence (recommendations that trial courts were *not* obligated to follow). *Id.* at 620. A death sentence thus could be imposed if a trial court independently found that an aggravating circumstance was present and that the circumstance outweighed any mitigating ones. *Id.* at 622. *Hurst* ruled that a jury's advisory recommendations with respect to aggravating circumstances did not satisfy the Sixth Amendment. *Id.*

Critically, a footnote in *Ring* clarified the narrow nature of its ruling (which illustrates the narrow scope of *Hurst* as well). 536 U.S. at 597 n.4. *Ring* addressed only the aggravating-circumstance finding that makes a defendant death-penalty *eligible*. The case did *not* consider "mitigating circumstances"; it did not address whether "the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty"; and it did "not

question [a state court's] authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." *Id.*

These disclaimers reconciled *Ring* (and *Hurst*) with the Court's other cases, including *Clemons*. In *Clemons*, the Court held that "a death sentence that is based in part on an invalid or improperly defined aggravating circumstance" may be cured by "a state appellate court." 494 U.S. at 741. The Mississippi Supreme Court had affirmed a death sentence that was based on two aggravating factors, one of which was "constitutionally invalid." *Id.* This Court held that state appellate courts may uphold such a sentence by "careful appellate weighing of" the valid aggravating factors and mitigating circumstances. *Id.* at 748-50. Thus, while *Clemons* contained broader dicta that did not survive *Ring*—e.g., suggesting that "the Sixth Amendment does not require that a jury specify the aggravating factors," *id.* at 746—its central holding permitting appellate reweighing when the jury has found at least one valid aggravating factor did survive. *See Ring*, 536 U.S. at 597 n.4.

Read together, *Ring* and *Clemons* show that the jury must factually find the aggravating circumstance that makes a defendant *eligible* for the death penalty, but need not undertake the *weighing* of aggravating and mitigating circumstances to determine whether the death penalty is the proper punishment. This makes sense. "[T]he aggravating-factor determination (the so-called 'eligibility phase')" "is a purely factual determination," one that implicates the jury-trial right. *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). "[T]he ultimate question whether mitigating

circumstances outweigh aggravating circumstances," by contrast, "is mostly a question of mercy" rather than of fact. *Id.*; *cf. Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality op.).

After *Ring*, therefore, this Court has held that state law may authorize a death sentence when the jury finds that the aggravating and mitigating circumstances are in *equipoise*. *See Kansas v. Marsh*, 548 U.S. 163, 165-66 (2006). To reach that result, *Marsh* relied on a non-overruled portion of *Walton*, which held that a "state death penalty statute may place the burden *on the defendant* to prove that mitigating circumstances outweigh aggravating circumstances." *Marsh*, 543 U.S. at 173 (emphasis added). Yet if the balancing of aggravating and mitigating circumstances qualified as a "fact-finding" with respect to an "element" within the meaning of the Sixth Amendment, that amendment would require a beyond-a-reasonable-doubt standard for this weighing process. *See Apprendi*, 530 U.S. at 490.

In sum, this Court's cases distinguish between *eligibility* errors that involve a lack of fact-finding by the jury (where the Sixth Amendment restricts appellate reweighing) and *weighing* errors that involve the jury's moral judgment about whether to impose the death penalty (where the Eighth Amendment permits appellate reweighing). When a jury has found beyond a reasonable doubt at least one valid aggravating circumstance, as was the case in *Clemons*, the defendant's eligibility for the death penalty satisfies the Sixth Amendment and an appellate court may affirm a sentence even if other aggravating factors relied on by the jury were "invalid or

improperly defined." *See Clemons*, 494 U.S. at 741; *see also id.* at 748. Where, however, a jury has found *no* aggravating factors, *Ring* precludes appellate reweighing. 536 U.S. at 596, 609.

2. The Sixth Circuit's decision muddies the clear distinction between the eligibility and weighing stages

The Sixth Circuit's decision erases the line between *Clemons* (where appellate reweighing is allowed) and *Ring* (where it is not). Here, at the guilt phase of Hutton's trial, the jury found beyond a reasonable doubt that two aggravating circumstances made him death-penalty eligible. Trial Tr., R.16-29, PageID#7697-700. Thus, "Hutton's eligibility for the death penalty is indisputable." Pet. App. 48a (Rogers, J., dissenting). The alleged constitutional error instead occurred at the penalty (or weighing) phase, after the jury had determined Hutton's eligibility. Because the penalty-phase instructions (allegedly) did not adequately explain that the aggravating circumstances were limited to those that the jury had found at the guilt phase, the Sixth Circuit decided that the jury's weighing process could have included invalid aggravators. Pet. App. 24a. And even though the appellate courts reweighed the valid aggravating factors against the mitigating ones, the Sixth Circuit added that *Ring* and *Hurst* barred this reweighing to fix the alleged error. Pet. App. 22a-23a. This analysis conflicts with this Court's cases.

To begin with, *Ring* limits only judicial *fact-finding*—not the *moral judgment* involved in determining whether aggravating factors outweigh mitigating ones. *Carr*, 136 S. Ct. at 642; *cf. Ring*, 536

U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed."). The petitioner's "tightly delineated" claim in *Ring* was *not* "that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty." 536 U.S. at 597 n.4. And *Ring* did "not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." *Id.* (citing *Clemons*). Whereas the jury in *Ring* found *no* aggravating circumstances that made the defendant death-penalty eligible, *id.* at 592-96, the jury in this case *indisputably* found two, Pet. App. 245a, 259a-260a. "That distinction makes all the difference for Sixth Amendment purposes." Pet. App. 52a (Rogers, J., dissenting).

Nor could the Sixth Circuit distinguish *Clemons*. Pet. App. 23a-24a. In *Clemons*, the court reasoned, the jury considered at least *one* valid aggravating factor in its weighing. Pet. App. 24a. Here, the Sixth Circuit appears to have reasoned that the jury might not have found *any* valid aggravating factors at the penalty phase, *id.*, even though the jury found two aggravating circumstances at the guilt phase, Trial Tr., R.16-29, PageID#7697-700. But it is sheer speculation to suggest that the jury's weighing in *Clemons* placed greater significance on the valid (as opposed to the invalid) aggravating factor. Instead, the decision's main holding rested on its conclusion that a defendant has no right to have a jury make the *ultimate* sentencing decision, *Clemons*, 494 U.S.

at 746, and that an appellate court could adequately reweigh the valid aggravating and mitigating circumstances to make that decision, *id.* at 748-52. This logic just as much applies here as it did there.

The decision below also effectively follows an earlier prediction of one panel member—that "it seems very likely that *Ring* has overruled *Clemons*." *Baston v. Bagley*, 420 F.3d 632, 639 n.1 (6th Cir. 2005) (Merritt, J., dissenting). Indeed, the concurrence below read *Hurst* as extending the Sixth Amendment into the weighing stage by holding that a *jury* must find that the "aggravators outweigh the mitigators." Pet. App. 39a n.1 (Merritt, J., concurring). This view that *Ring* (and *Hurst*) overruled *Clemons* (and *Marsh*) likewise conflicts with this Court's cases. "'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). *Ring* and *Clemons* are easily reconcilable. But, even if they were not, the Sixth Circuit should have followed the case that was directly on point at the weighing stage (*Clemons*); it should not have extended other cases (*Ring* and *Hurst*) into a new orbit that they have yet to reach.

B. The Sixth Circuit's Decision Conflicts With Cases That Reject Attempts To Extend *Ring* Into The Weighing Stage

The Sixth Circuit's decision also conflicts with appellate decisions that have rejected claims that *Ring*'s principles apply at the weighing stage.

Before *Hurst*, for example, circuit courts had repeatedly rejected challenges to the federal death-penalty regime, a regime that would conflict with the Sixth Amendment if the amendment applied at the weighing stage. Federal law does *not* require a jury to use the beyond-a-reasonable-doubt standard when deciding whether the aggravating circumstances outweigh the mitigating ones. 18 U.S.C. § 3593(e). Instead, a jury need only "consider whether all the aggravating . . . factors found to exist *sufficiently outweigh* all the mitigating . . . factors found to exist to justify a sentence of death." *Id.* (emphasis added); *cf. Apprendi*, 530 U.S. at 490.

The circuit courts that upheld this regime *before Hurst* (including the Sixth Circuit) concluded that *Ring categorically* did not apply at the weighing stage. "Since the Constitution does not require a jury to do the weighing, we cannot conclude that the showing required must be proof beyond a reasonable doubt." *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007) (relying on *Clemons* and *Proffitt*); *see also United States v. Gabrion*, 719 F.3d 511, 531-33 (6th Cir. 2013) (en banc); *United States v. Runyon*, 707 F.3d 475, 515-16 (4th Cir. 2013); *United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31-32 (1st Cir. 2007). These courts recognized that "the requi-

site weighing constitutes a process, not a fact to be found." *Sampson*, 486 F.3d at 32. It is, in other words, a "complex moral judgment." *Runyon*, 707 F.3d at 516.

In addition, under some state laws the jury does *not* make the ultimate finding that the aggravating circumstances outweigh the mitigating ones. In Alabama, a trial court may overrule a jury's life-imprisonment recommendation (so long as the jury has found that an aggravating circumstance existed so as to make the defendant death-penalty eligible). *See Ex parte Waldrop*, 859 So. 2d 1181, 1188-90 (Ala. 2002); *Lee v. Comm'r, Ala. Dep't of Corrs.*, 726 F.3d 1172, 1197-98 (11th Cir. 2013) ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances."). The Alabama Supreme Court has since ruled that *Hurst* does not affect the weighing stage or require it to change course. *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *5-6 (Ala. Sept. 30, 2016), *cert. denied*, No. 16-6746, 2017 WL 276218 (U.S. Jan. 23, 2017).

The Sixth Circuit's decision below that *Ring*—at least after *Hurst*—applies at the weighing stage of a capital trial cannot be reconciled with these cases. Pet. App. 22a-25a. Again, the jury here indisputably found two aggravating circumstances beyond a reasonable doubt at the guilt phase. Trial Tr., R.16-29, PageID#7697-700. That the trial court allegedly "gave the jury no guidance as to what to consider as aggravating circumstances" when weighing those circumstances against the mitigating ones, Pet. App. 24a, would not raise any Sixth Amendment concern

under these other cases. Indeed, *Bohannon*'s logic suggests that Hutton did not have a right to a jury trial *at all* at the weighing stage—even after *Hurst*.

* * *

The Sixth Circuit's resolution of each of these issues warrants this Court's attention. It also bears noting that the court had no need to engage in its significant expansions of the actual-innocence exception or *Ring* because the penalty-phase jury instructions likely did not even raise a constitutional problem. The test for alleged instructional errors asks "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citation omitted). Here, the instructions conveyed that Ohio had to prove "that the aggravating circumstances, *of which the Defendant was found guilty*, outweigh the factors in mitigation." Trial Tr., R.16-29, PageID#7767 (emphasis added). And the prosecutor identified the aggravating circumstances that were found at the guilt phase as the ones that were at issue at the penalty phase. *Id.*, R.16-24, PageID#6119-21; *id.*, R.16-29, PageID#7729-31. It is speculative to suggest that the jury did not understand that its penalty-phase weighing should consider only those circumstances. At the least, the prosecutor, defense counsel, and trial judge were better positioned in 1986 to know whether the jury understood the aggravating circumstances than a federal court reviewing a cold record 30 years later.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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